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Legislative Bulletin.....May 27, 2010

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H.R. 5136—Fiscal Year 2011 National Defense Authorization Act

**H.R. 5136—Fiscal Year 2011 National Defense Authorization Act
 (Skelton, D-MO)**

Order of Business: The bill is scheduled to be considered on Thursday, May 27, under an expected structured rule that provides for one hour of general debate and makes in order a number of amendments.

Summary: H.R. 5136 authorizes approximately \$760 billion for FY2010 and FY 2011. Specifically, the bill authorizes \$566.6 billion for Department of Defense (DoD) routine defense spending and additional defense programs at the Department of Energy. Additionally, the bill authorizes \$159.3 billion to fund Fiscal Year 2011 anticipated war costs. The bill also authorizes \$33.7 billion to cover the cost for operations and Iraq and Afghanistan for this fiscal year 2010 and to provide humanitarian and disaster assistance to assist victims following the earthquake in Haiti. The bill passed out of the House Armed Services Committee by a vote of 59 – 0. Major policy provisions of note are as follows:

- **Joint Strike Fighter (F-35):** H.R. 5136 authorizes a total of \$11.8 billion for the purchase of up to 42 F-35’s for FY 2011. The bill authorizes \$4.1 billion for 20 Navy and Marine Corps F-35 Joint Strike Fighter aircraft and \$7.7 billion for up to 22 F-35s for the Air Force. The bill limits the number of F-35s for the Department of Defense to a total of 30 planes of the 42, until the Department of Defense meets certain benchmarks planned by the Department of Defense to be completed in calendar year 2010. Recently, the DoD determined the entire cost to develop the program, which will ultimately supply 2,457 F-35s in three versions to the Air Force, Navy and Marine Corps, would cost \$322.6 billion.
- **F-35 Alternative Engine (F136):** The bill contains \$485 million in FY11 for the Joint Strike Fighter (F-35) alternate engine program (F136). H.R. 5136 directs the DoD to pursue development of the F136 engine by restricting funds for the F-35 program. The bill limits funding for the F-35 (to 75 percent) until the DoD can certify all funds for development and procurement of the F-35 competitive propulsion systems have been obligated for FY11. The bill also requires the DoD to consider the program in the Administration’s FY 2012 budget request.

Currently, Pratt and Whitney holds the sole contract to build the primary engine, while General Electric/Rolls Royce are in a partnership attempting to become party to the contract to build a second, alternative engine (F136) for the F-35. In 2001, the DoD chose Lockheed Martin to develop the F-35s using engines made by Pratt & Whitney. They also supported the development of the F136 until 2006 when they had reservations about continuing the program and thought the funding would be better used for other purposes.

The cost for the entire lifespan of the F-35 engine contract is estimated to be worth approximately \$100 billion. Last year, the NDAA provided \$465 million for the continuation of the program despite opposition from the administration. Congress has appropriated funding for the program each year since 2006 when the Pentagon no longer requested funding for it. Through fiscal year 2010, the government has invested about \$2.9 billion in the F136.

Defense Secretary Gates has stated he will encourage President Obama to veto the NDAA if the bill contains funding for the Alternative Engine Program saying that finishing development would cost \$2.9 billion over the next six years. However, the Pentagon has not yet presented Congress with evidence to corroborate this claim. Additionally, almost all DoD engine contracts are single source already and this program has encountered extreme cost overruns.

General Electric and Rolls Royce [contend the remaining costs](#) to develop the F136 are approximately \$1.1 billion lower than Secretary Gates estimates. In addition, GE expects the program to pay for itself because taxpayers would ultimately benefit through the competition created by a second engine program. They cite a two-engine program in the 1980's for F-15's and F-16's that saved an estimated 21 percent on the contract.

Some conservatives believe the continuation of a competitive engine is a national security imperative because a sole source contract leaves the military vulnerable to fleet groundings. In addition, some conservatives agree that increased competition will ultimately benefit the taxpayer by reducing contract awards. The Heritage Foundation asserts a single engine contract "[constitutes an unacceptably high risk.](#)"

However, some conservatives disagree and contend the alternate engine an example of a big ticket defense program and "undisclosed earmark." [Citizens Against Government Waste](#) believes that "taxpayers can't afford this kind of high-flying waste." Secretary of Defense Robert Gates believes that, "the interests of the taxpayers, our military, our partner nations, and the integrity of the JSF program are best served by not pursuing a second engine." Taxpayers for Common Sense [contend in the Politico](#) any potential savings would, "most likely be swallowed up by the added expense of maintaining two separate production lines, supply chains and management teams."

An amendment by *Representative Larson (D-CT)* is expected to be offered to eliminate the \$485 million alternative engine program from the underlying bill and direct that funding towards the National Guard and deficit reduction.

- ***Nuclear Weapons:*** H.R. 5136 prohibits the reduction of our nuclear arsenal below the levels outlined in the agreement with Russia until the Secretary of Defense submits a report to Congress justifying the reduction and operational implications of the START treaty signed with Russia earlier this year. Additionally, the bill contains a "sense of

congress” that the Nuclear Posture Review “weakens the national security of the United States to defend itself against catastrophic nuclear, biological, chemical or conventional attack.” Review this [RSC Policy Brief](#) for additional background on these issues.

The bill authorizes \$2.7 billion for the Department of Energy and \$522 million for the Department of Defense’s nonproliferation efforts, the same as the President’s Budget request.

Missile Defense: H.R. 5136 provides \$10.3 billion in funding for ballistic missile defense programs - a \$361.6 million increase over FY 2010. However, some conservatives may be concerned that this level is still below FY09 appropriated levels and does not address the Obama administration’s decision to withdraw from placing strategic missile defense sites in Europe.

RSC National Security Working Group Chairman Trent Franks has expressed concern that “by canceling the ground-based missile defense site in Europe, the Obama administration gave Iran a green light in its pursuit of nuclear hegemony. According to the latest intelligence assessments, Iran may have an ICBM capability by 2015, five years before the Phased Adaptive Approach (which is long on rhetoric and short on specifics) is capable of providing the U S homeland any redundant coverage against an Iranian ICBM. The Obama Administration is failing its foundational responsibility to maintain national security as its highest priority.”

- **Guantanamo Bay:** H.R. 5136 *does not prohibit funds* from being used to *transfer or release prisoners* held at Guantanamo Bay, Cuba into the United States or territories. Instead, the bill requires a report from the administration on the merits, costs, and risks of using any proposed facility in the U.S. by April of 2011.

H.R. 5136 prohibits funds from being eligible *to build or convert any facility* in the U.S. to accept GITMO detainees. The administration had requested \$350 million of DOD funding and \$237 million in DOJ funding to open a prison facility in Thompson, Illinois to hold prisoners currently held in Guantanamo Bay. Review this [RSC Policy Brief](#) for additional background on this issue.

The bill also directs the Pentagon’s Inspector General (IG) to investigate claims that lawyers for the John Adams Project may have placed military and U.S. government personnel at risk by interfering with the operations at Guantanamo Bay.

- **Don’t Ask, Don’t Tell:** While H.R. 5136 does not contain language that would change the military’s conduct policy, known as Don’t Ask Don’t Tell (DADT); an amendment is expected to be offered by *Rep. Murphy (D -CT)* to repeal DADT. If this amendment were to pass, it is expected many conservatives would have strong reservations about supporting final passage of H.R. 5136.

The proposed amendment to overturn DADT would allow the President to prematurely enact a major cultural change in the military during the operation of two wars. Secretary Gates had requested for Congress to take no action on this issue until the Pentagon could review the implications of repealing DADT, by Dec. 1, 2010, to allow members of the armed services are able to express their concerns or support for such a measure.

- **Iran:** The bill contains an amendment offered by Representative Franks (R-AZ) that requires the Department of Defense to develop a National Military Strategic Plan to prevent the Iranian regime from obtaining a nuclear weapon.
- **Aircraft Procurement:** H.R. 5136 does not contain funding for the C-17 aircraft, Secretary Gates also threatened to recommend a veto if the bill contained funding for additional C-17 transport planes. The bill also prohibits the retirement of fighter aircraft from the Air Force or Air National Guard in FY 2011 until the GAO conducts a study to determine fighter jet inventory. The bill authorizes the purchase for a total of 206 aircraft, including 30 F-18 strike fighters and 12 EA-18 expeditionary electronic warfare aircraft.

The bill also requires a report to Congress from the DOD regarding the competitive bidding process for Air Force refueling tankers as they relate to bids that are assisted through government subsidies. This provision relates to the ongoing bidding process between Boeing and EADS to secure a contract worth approximately \$35 billion to build 179 KC-X refueling tanker planes.

- **Naval Vessel Procurement:** The bill authorizes the acquisition of 9 new ships, including \$5.1 billion for 2 Virginia-class submarines, \$3 billion for 2 DDG 51 destroyers, and \$1.5 billion for 2 Littoral Combat Ships.
- **Military Pay & Benefits:** The bill provides a 1.9 percent pay raise for troops, which is above the Obama administration's request of 1.4 percent. The bill also includes a pilot program under Military Spouse Career Advancement Accounts (MyCAA) program for comprehensive career development counseling for military spouses. Additionally, the bill provides a one-time special compensation of up to \$3500 for service members with a combat related catastrophic injury or illness to assist with providing attendance care. The bill also increases danger pay from \$225 to \$260 per month and a family separation allowance increase from \$250 to \$285 per month.
- **TRICARE:** H.R. 5136 extends the period of eligibility of a dependent to receive TRICARE Reserve Select coverage to 26 and requires the Secretary of Defense to administer the TRICARE program.
- **Military Readiness:** H.R. 5136 contains \$168 billion for military operations and training accounts, and approximately \$9.8 billion for U.S. Special Operations Command, tasked with conducting special operations forces for all branches of the military.
- **Fort Hood:** The bill allows military and DoD employee civilian victims of the Fort Hood shooting to receive combat zone benefits and provides the Secretary of Defense authority to make payments for similar incidents in the future. However, the bill does not require the public release of the restricted annex to review the shootings to further understand the motivation for the terrorist attack.
- **Earmarks:** Armed Services Committee Report 111-491, which accompanies H.R. 5136, contains approximately 238 individual earmarks that total approximately \$910 million, based on estimates compiled by CRS. These requests range from a high of \$24.2 million by *Rep. Skelton (D-MO)* for Whiteman AFB for a consolidated air operations facility and a low request of \$146,000 by *Rep. Snyder (D-AR)* for the University of Central Arkansas for a Gulf War Syndrome Brain Image Analysis.

Authorization Highlights: This authorization measure sets the spending levels for all DoD programs and sets military strength levels. What follows are *highlights* of authorization levels of the three divisions (Dept. of Defense, Military Construction, and Dept. of Energy & Others) in the bill.

Division A = Department of Defense Authorizations

Division B = Military Construction Authorizations

Division C = Department of Energy National Security Authorizations and Other Authorizations

Division A—Department of Defense Authorizations

Division A—Procurement

- **Army.** Aircraft--\$5.98 billion; Missiles--\$1.63 billion; Weapons and Tracked Combat Vehicles--\$1.62 billion; Ammunition--\$1.95 billion; Other Procurement--\$9.39 billion.
- **Navy.** Aircraft--\$19.13 billion; Weapons (including missiles and torpedoes)--\$3.35 billion; Shipbuilding and Conversion--\$15.2 billion; Other Procurement--\$6.45 billion; Ammunition (Navy and Marine Corps)--\$818 million.
- **Marine Corps.** \$1.38 billion
- **Air Force.** Aircraft--\$15.35 billion; Ammunition--\$672.4 million; Missiles--\$5.47 billion; Other Procurement--\$17.9 billion.
- **Defense-Wide Activities.** \$4.4 billion.

Division A—Research, Development, Test, and Evaluation

- **Army.** \$10.3 billion
- **Navy.** \$17.9 billion
- **Air Force.** \$27.2 billion
- **Defense-Wide Activities.** \$20.9 billion (\$195 million reserved for Operational Test & Evaluation, Defense-Wide).

Division A—Funding for Operations and Maintenance

<i>Army</i>	<i>\$34.2 billion</i>
<i>Navy</i>	<i>\$37.9 billion</i>
<i>Marine Corps</i>	<i>\$5.6 billion</i>
<i>Air Force</i>	<i>\$36.2 billion</i>
<i>Defense-Wide Activities</i>	<i>\$30.2 billion</i>
<i>Army Reserve</i>	<i>\$2.9 billion</i>
<i>Naval Reserve</i>	<i>\$1.4 billion</i>
<i>Marine Corps Reserve</i>	<i>\$287 million</i>
<i>Air Force Reserve</i>	<i>\$3.3 billion</i>
<i>Army National Guard</i>	<i>\$6.6 billion</i>
<i>Air National Guard</i>	<i>\$5.9 billion</i>
<i>U.S. Court of Appeals for the Armed Forces</i>	<i>\$14 million</i>
<i>Acquisition Development Workforce Fund</i>	<i>\$229 million</i>
<i>Army Environmental Restoration</i>	<i>\$445 million</i>
<i>Navy Environmental Restoration</i>	<i>\$305 million</i>

<i>Air Force Environmental Restoration</i>	<i>\$502 million</i>
<i>Defense-wide Environmental Restoration</i>	<i>\$10.7 million</i>
<i>Formerly Used Defense Sites Environmental Restoration</i>	<i>\$296 million</i>
<i>Overseas Humanitarian, Disaster, and Civics Programs</i>	<i>\$108 million</i>
<i>Cooperative Threat Reduction Programs</i>	<i>\$552 million</i>

Division A—Military Personnel Authorization Levels

Authorized personnel levels as of September 30, 2010:

<i>Army</i>	<i>569,400</i>
<i>Navy</i>	<i>328,700</i>
<i>Marine Corps</i>	<i>202,100</i>
<i>Air Force</i>	<i>332,200</i>
<i>Army National Guard, Selected Reserve</i>	<i>358,200</i>
<i>Army Reserve, Selected Reserve</i>	<i>205,000</i>
<i>Navy Reserve, Selected Reserve</i>	<i>65,500</i>
<i>Marine Corps Reserve, Selected Reserve</i>	<i>39,600</i>
<i>Air National Guard Reserve, Selected Reserve</i>	<i>106,700</i>
<i>Air Force Reserve, Selected Reserve</i>	<i>71,200</i>
<i>Coast Guard Reserve, Selected Reserve</i>	<i>10,000</i>
<i>Army National Guard, Full-Time Duty</i>	<i>32,060</i>
<i>Army Reserve, Full-Time Duty</i>	<i>16,261</i>
<i>Navy Reserve, Full-Time Duty</i>	<i>10,688</i>
<i>Marine Corps Reserve, Full-Time Duty</i>	<i>2,261</i>
<i>Air National Guard, Full-Time Duty</i>	<i>14,584</i>
<i>Air Force Reserve, Full-Time Duty</i>	<i>2,992</i>
<i>Army National Guard, Dual-Status Technicians</i>	<i>8,395</i>
<i>Army Reserve, Dual-Status Technicians</i>	<i>27,210</i>
<i>Air National Guard, Dual-Status Technicians</i>	<i>22,313</i>
<i>Air Force Reserve, Dual-Status Technicians</i>	<i>10,720</i>
<i>Army Reserve, Non-Dual-Status Technicians</i>	<i>No more than 595</i>
<i>Army National Guard, Non-Dual-Status Technicians</i>	<i>No more than 2,520</i>
<i>Air Force Reserve, Non-Dual-Status Technicians</i>	<i>No more than 90</i>
<i>Air National Guard, Non-Dual-Status Technicians</i>	<i>No more than 350</i>
<i>Total Authorized Personnel Level</i>	<i>2,411,826</i>

Maximum numbers of reservists who may be serving at any time on full-time operational support duty:

- Army National Guard: 17,000
- Army Reserve: 13,000
- Naval Reserve: 6,200
- Marine Corps Reserve: 3,000
- Air National Guard: 16,000
- Air Force Reserve: 14,000

Authorization of Appropriations for Military Personnel: \$138,540,700,000

Division A—Cooperative Threat Reduction with States of the Former Soviet Union

From funds allocated for operation and maintenance above:

- **Strategic Offensive Arms Elimination in Russia.** \$66.7 million
- **Strategic Nuclear Arms Elimination in Ukraine.** \$6.8 million
- **Nuclear Weapons Storage Security in Russia.** \$9.6 million
- **Nuclear Weapons Transportation Security in Russia.** \$45 million
- **Weapons of Mass Destruction Proliferation Prevention in the Former Soviet Union.** \$79.8 million
- **Biological Weapons Proliferation Prevention in the Former Soviet Union.** \$209 million
- **Chemical Weapons Destruction.** \$3 million
- **Defense and Military Contacts.** \$5.0 million
- **Global Nuclear Lockdown:** \$74.5 million

Division A—Other Authorizations

- **Defense Working Capital Funds.** \$160.9 million
- **Defense Working Capital Fund Defense Commissary.** \$1.27 billion
- **National Defense Sealift Fund.** \$934.8 million
- **Defense Health Program.** \$30.99 billion
- **Chemical Agents and Munitions Destruction.** \$1.46 billion
- **Defense Wide Drug Interdiction.** \$1.13 billion
- **Defense Inspector General.** \$282.3 million
- **Armed Forces Retirement Home.** \$71.2 million
- **National Defense Stockpile.** Authorizes \$41.2 million from the National Defense Stockpile Transaction Fund for the operation and maintenance of the National Defense Stockpile for FY 2011.
- **Operations in Afghanistan, Iraq, and Haiti:** Increases FY 2010 authorization levels for military and humanitarian operations.

Division B—Military Construction Authorizations

Division B—Military Construction

- **Army.** \$4.8 billion
- **Navy.** \$4.5 billion
- **Air Force.** \$1.9 billion
- **NATO Security Investment Program.** \$259 million
- **Army National Guard.** \$1 billion
- **Army Reserve.** \$358 million
- **Naval and Marine Corps Reserve.** \$91.5 million
- **Air National Guard.** \$292 million
- **Air Force Reserve.** \$47 million

Division C—Department of Energy National Security Authorizations and Other Authorizations

Division C—Department of Energy National Security Programs

- **Weapons Activities.** \$7 billion
- **Defense Nuclear Nonproliferation.** \$2.7 billion

- **Naval Reactors.** \$1 billion
- **Office of Administrator for Nuclear Security.** \$448.3 million
- **Defense Environmental Cleanup.** \$5.6 billion
- **Other Defense Activities for National Security.** \$878.2 million
- **Defense Nuclear Waste Disposal.** \$98.4 million
- **Energy Security and Assurance Programs.** \$6.2 million

- **Guantanamo Bay:** Some conservatives may be concerned that legislation *does not* specifically contain language that prohibits the transfer or release of Guantanamo Bay detainees into the U.S.

- **Limits Public-Private Competition:** Some conservatives may be concerned that Section 322 of the bill limits (A-76) public-private competition for Department of Defense contracts. Some conservatives may be concerned because public-private competition has historically shown lowered contracting costs while increasing efficiency.

Cost to Taxpayers: According to CBO, “H.R. 5136 would authorize appropriations totaling \$726 billion for fiscal year 2011. The bill also would authorize an additional \$34 billion for fiscal year 2010.”

“H.R. 5136 contains several provisions that would affect direct spending. CBO estimates that, in total, those changes would decrease direct spending by \$15 million over the 2011- 2015 period and by \$2 million over the 2011-2020 period.”

Committee Action: H.R. 5136 was introduced on April 26, 2010, and referred to the Committee on Armed Services. On May 12, 2010, the bill was referred to each Armed Services subcommittee, which each held mark-ups, amended the bill, and forwarded to the full committee by voice vote. A full committee mark-up was held on May 19, 2010, and the bill was reported, as amended, by a vote of 59-0.

Administration Position: A Statement of Administration Policy (SAP) is not available at press time.

Does the Bill Expand the Size and Scope of the Federal Government? Yes, the bill creates several new programs within the Department of Defense.

Does the Bill Contain Any Federal Encroachment into State or Local Authority in Potential Violation of the 10th Amendment? No. Providing for the common defense is a primary constitutional duty of the federal government.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates? According to [Committee Report 111-491](#), “pursuant to section 423 of Public Law 104-4, this legislation contains no federal mandates with respect to state, local, and tribal governments, nor with respect to the private sector. Similarly, the bill provides no federal intergovernmental mandates.”

Constitutional Authority: Armed Services [Committee Report 111-491](#), finds constitutional authority in Article I, Section 8, but does not cite a specific clause. House Rule XIII, Section 3d (1), requires that all committee reports contain “a statement citing the *specific* powers granted to

Congress in the Constitution to enact the law proposed by the bill or joint resolution.” *[emphasis added]*

Article I, Section 8, Clause 1 grants Congress the power to “provide for the common Defense and general welfare of the United States.” Article I, Section 8, Clauses 12 through 16 grant Congress the power “To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval forces; To provide for calling forth the Militia to execute the Laws of the Unions, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia and for governing such Part of them as may be employed in the Service of the United States...” In addition, Article I, Section 8, Clause 17 provides that Congress shall have the power “To exercise exclusive Legislation in all Cases whatsoever...over all Places purchased by the Consent of the Legislature of the state in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings.”

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits (House Rule XXI, Clause 9): Yes, the accompanying Committee Report to H.R. 5136 contains a list of approximately 238 individual earmarks that total approximately \$910 million, based on estimates compiled by CRS.

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